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FOUNDED 1866

October 1, 2010

By Hand

Marlene H. Dortch
 Secretary
 Federal Communications Commission
 445 12th Street, S.W.
 Washington, D.C. 20554

Re: Informal Complaint of AT&T Corp.

Dear Ms. Dortch:

Complainant AT&T Corp. ("AT&T") respectfully submits this informal complaint pursuant to Sections 201, 203, and 208 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (the "Act"), 47 U.S.C. §§ 201, 203 & 208, and Section 1.716 of the Commission's Rules, 47 C.F.R. § 1.716, against Defendant YMAX Communications Corp. ("YMAX"). [BEGIN CONFIDENTIAL]

[REDACTED]

[END

CONFIDENTIAL]

Introduction and Summary. AT&T seeks to recover damages and to obtain declaratory and injunctive relief against YMAX, a putative competitive local exchange carrier ("CLEC"). YMAX has unlawfully billed AT&T millions of dollars for end office local switching and other switched access services that YMAX does not actually provide.

Rather, YMAX provides only intermediate protocol conversion and transiting functions to facilitate connections between other networks. YMAX performs these functions to support calls between telephones on the public switched telephone network ("PSTN") and Internet-connected telephones and personal computers that are attached to a device called the "magicJack[®]," which is marketed by a YMAX affiliate, MagicJack LP, and which facilitates



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Voice over Internet Protocol (“VoIP”) calls.¹ These calls originate and terminate on the networks of third parties that are not affiliated with YMAX. Indeed, on many of the calls for which YMAX bills AT&T terminating or originating switched access charges, one of AT&T’s own broadband Internet service provider (“ISP”) affiliates actually routes and delivers the calls to or from the magicJack[®] purchaser. YMAX itself employs an extremely limited architecture and does nothing more than provide a short bridge and protocol conversion between the PSTN and the Internet in the middle of each such call, and, as detailed below, YMAX’s switched access service billing practices and tariff provisions are thus unlawful in multiple respects.

First, the Commission has specifically ruled that it is an unreasonable practice for a CLEC to assess tariffed end office switching charges when the CLEC does not actually provide the functional equivalent of the end office switching that would be provided by the competing incumbent local exchange carrier (“ILEC”).² Here, YMAX does not operate the local switching stations that connect directly to common lines that deliver calls to or from the called or calling parties. Nor is any aspect of YMAX’s limited architecture in any way functionally equivalent to end office switching. YMAX nonetheless assesses end office and other local switching charges as if it did provide that functionality.

The Commission’s CLEC access charge rules and orders, which expressly provide that a CLEC that merely passes traffic between other networks can assess, at most, tandem switching charges, were adopted to prevent precisely this sort of unreasonable CLEC practice. The Commission has recognized that CLECs have terminating monopolies and that, absent Commission rules and oversight, CLECs have the incentive and ability to impose unwarranted and unreasonable charges. The CLEC access charge rules and orders thus require CLECs to charge only for the functions that they actually perform, and they prohibit CLECs from tariffing any rate for those functions that is higher than the rate of the competing ILEC. Although YMAX is certainly free to design innovative ways of offering telephone services and may be entitled to enter into arrangements for compensation for the minimal functions it performs, it may not use the tariff regime to attempt to force IXCs to pay millions of dollars of “end office” switching charges for functions that it does not actually perform. The broadband ISPs that perform the local routing and transmission necessary to deliver the calls to or from magicJack[®] purchasers recover their costs directly from those magicJack[®] purchasers, and it would be patently unreasonable – and grant YMAX an entirely unwarranted windfall – if YMAX were allowed to charge IXCs for these same facilities and functionality, which YMAX simply does not provide.

¹ An image of the magicJack[®] device that illustrates how it connects to a broadband-connected computer and a telephone is available at <http://bit.ly/cQBWnA>.

² See Eighth Report and Order and Fifth Order on Reconsideration, *In re Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, 19 FCC Rcd. 9108, ¶ 15 (2004) (“CLEC Access Charge Recon Order”); 47 C.F.R. § 61.26.



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YMAX contends that the terms of its tariff³ permit it to assess end office switching charges notwithstanding its limited architecture. If that were the case, then YMAX's tariff would itself be unjust and unreasonable in violation of Section 201(b). But it is not; rather it appears that YMAX is blatantly violating the terms of its tariff that govern end office switching charges. YMAX borrowed the terms of its tariff from traditional ILEC tariffs, which describe actual local networks and define end office switching as the switches that actually connect directly to the station loops serving individual customer premises. YMAX, however, does not own or operate any such equipment; it performs radically different functions (such as protocol conversions), often hundreds or even thousands of miles away from the called and calling parties. In all events, regardless of the terms of its tariff, YMAX's practice of billing for end office switching violates Section 201(b).

Second, the limited services YMAX provides are, in truth, not common carrier switched access services at all, for three reasons: (1) Because YMAX's role as an intermediate connection point between the PSTN and the Internet requires it to provide a net TDM/IP protocol conversion, its service is plainly an information service, not the common carrier telecommunications service it has tariffed; (2) YMAX's tariff makes clear that it provides switched access services only when it actually terminates (or originates) a call to (or from) the "physical location" of an "end user," which the tariff defines as a person that uses YMAX's services under the terms and conditions of its tariff. But magicJack[®] purchasers are not billed and do not pay *any* tariffed charges, which, as the Commission recently held, forecloses any claim that they are end users;⁴ and YMAX does not, in any event, deliver calls to or from any end user's physical location; (3) YMAX's tariff also defines tandem switching service by reference to the architecture of a traditional ILEC network, and YMAX does not provide any service that would qualify as "tandem switching" service within the terms of the tariff.

Third, YMAX has violated its interstate tariff and Section 203 by billing calls at higher intrastate rates rather than at the lower interstate rate as its tariff requires. YMAX's FCC tariff provides that it will determine the jurisdiction of calls terminating to the magicJack[®] device using the "NPA-NXX" of the called and calling parties. *See* YMAX FCC Tariff, § 2.9.2.D. Although YMAX has never adequately responded to AT&T's requests regarding how YMAX determines jurisdiction for purposes of billing AT&T, YMAX's bills to AT&T have reflected a percentage of interstate terminating usage of only around 65 percent, much less than is typical. But the call record data that YMAX has provided to AT&T shows that, in fact, more than 80

³ Ymax Communications Corp., FCC Tariff No. 1 (issued April 25, 2007, effective April 26, 2007) ("YMAX FCC Tariff").

⁴ Second Order on Reconsideration, *Qwest Communications Corporation v. Farmers and Merchants Mutual Telephone Company*, 24 FCC Rcd. 14801 (2009) ("*Farmers IIP*"), *recon. denied*, Third Order on Reconsideration, 25 FCC Rcd. 3422 (2010).



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percent of the calls are interstate based upon NPA-NXX. Similarly, YMAX's interstate tariff provides that YMAX will bill "8YY" traffic at a "default" 50 percent interstate usage ("PIU") factor until it implements an IXC-supplied PIU. *Id.* § 2.9.2.H. Yet prior to YMAX's recent implementation of an AT&T-recommended PIU, YMAX was allocating as little as 20 percent of 8YY traffic to the interstate jurisdiction.

Fourth, some of YMAX's charges to AT&T have exceeded the rates in YMAX's own tariffs. For these charges, YMAX has thus squarely violated Section 203 of the Act, which precludes YMAX from billing charges that are higher than its tariffed rates.

Fifth, in some cases YMAX has assessed tariffed rates for interstate switched access service that exceed the "competing ILEC" rate that the Commission's access charge rules establish as a cap above which CLEC access services are mandatorily detariffed. MagicJack® purchasers can choose any phone number in YMAX's inventory, and many magicJack® purchasers choose numbers associated with geographic areas far removed from the physical location of their premises. Yet YMAX apparently charges the benchmark rate of the ILEC that operates in the geographic area associated with the telephone number YMAX has assigned to the magicJack® purchaser – which, as noted, may be in an entirely different state than the magicJack® purchaser's premises – rather than the benchmark rate of the competing ILEC – *i.e.*, the ILEC that would serve that end user in the city in which the end user is actually physically located.⁵

Background. "magicJack®" is marketed as a product that gives purchasers the ability to place and receive "free" telephone calls *if* the purchasers separately obtain and separately *pay* for high speed Internet access services and any usage charges.⁶ A magicJack® is a matchbox-sized device that includes, on one end, a USB "dongle" that plugs into a USB port on a computer and, on the other end, an RJ-11 telephone jack, into which an ordinary landline telephone can be plugged. When the magicJack® device is connected to a computer, VoIP software and account information is automatically transferred from the device to that computer. The magicJack® is "nomadic," in the sense that it is portable and can be used from any computer that is connected to a high-speed Internet access service.

The magicJack® is offered by YMAX's affiliate, MagicJack LP, for \$39.95, which includes the USB device and a one year license to use the associated VoIP software to make unlimited local and domestic long distance telephone calls.⁷ The magicJack® purchaser pays no

⁵ See *CLEC Access Charge Recon Order* ¶ 4; 47 C.F.R. § 61.26.

⁶ See <http://www.magicjack.com/5/index.asp>.

⁷ See <http://www.magicjack.com/5/faq/>. Additional years of unlimited calling can be purchased for \$19.95 per year.



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other fees to MagicJack LP – and nothing at all to YMAX – during the license term. Thus, after the magicJack[®] purchaser has registered with and obtained a telephone number, he or she can use existing high-speed Internet access service to place and receive telephone calls to and from points on the public switched telephone network (or to and from other magicJack[®] purchasers).⁸ YMAX recently disclosed that over six million magicJack[®] devices have now been sold.

To obtain telephone numbers and interconnection to the PSTN, MagicJack LP relies on its affiliate YMAX, which has been certified as a CLEC in most states and has entered into a variety of interconnection agreements with ILECs. According to entries that YMAX has made in the Local Exchange Routing Guide (“LERG”), YMAX has over 100 “POIs,” or points of interconnection; it has approximately 30 “media gateways” in various states; and it has a single “call agent,” “digital packet device,” and “trunk gateway,” all apparently located in Florida. Notably, in a recent filing with the Securities and Exchange Commission, YMAX indicated that it had “switches” in only 32 cities⁹ – which would seem to confirm that its 100 “points of interconnection,” which are located in approximately 46 states, and which YMAX appears to portray as “end offices,” do *not* have switches. The YMAX media gateways appear to consist of equipment that performs the necessary protocol conversions between the Internet Protocol (“IP”) used by the magicJack[®] device and the Time Division Multiplexing (“TDM”) protocol used on the PSTN.

YMAX has filed an interstate switched access tariff that contains rates for various switched access service rate elements that generally purport to match those of the ILEC in each exchange area (NPA-NXX) in which YMAX has obtained telephone numbers. The vast majority of the interstate access charges that YMAX has billed to AT&T are terminating end

⁸ MagicJack appears to meet the Commission’s definition of an interconnected VoIP service. 47 C.F.R. § 9.3 (“[a]n interconnected Voice over Internet protocol (VoIP) service is a service that: (1) Enables real-time, two-way voice communications; (2) Requires a broadband connection from the user’s location; (3) Requires Internet protocol-compatible customer premises equipment (CPE); and (4) Permits users generally to receive calls that originate on the public switched telephone network and to terminate calls to the public switched telephone network”). Although Interconnected VoIP providers are required to contribute to the universal service fund, 47 C.F.R. § 54.706(a)(18), AT&T was unable to locate a company record for MagicJack LP in the Commission’s database of universal service contributors (although YMAX is listed). See <http://fjallfoss.fcc.gov/cgb/form499/499a.cfm> (search for MagicJack); cf. VocalTec Communications Ltd., Report of Foreign Private Issuer Pursuant to Rule 13a-16 or 15d-16 (Form 6-K), at 12 (July 19, 2010) (“VocalTec 6-K”) (“magicjack believes that, like Skype, it is a non-interconnected VoIP provider”).

⁹ VocalTec 6-K (“YMAX has switches and related equipment in 32 major cities across the United States”).



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office switching charges that have been assessed on calls that have been placed from telephones on the PSTN (by retail or wholesale AT&T long distance customers) to magicJack[®] purchasers.

AT&T has performed test calls that have confirmed that YMAX's limited involvement in the handling of these calls may occur at points hundreds or even thousands of miles away from the magicJack[®]-connected telephone to which the call is delivered and does not involve any end office switching or termination functionality. For example, an AT&T employee purchased a magicJack[®] for use at his home in New Jersey where he purchases broadband Internet access service from Comcast. He selected a Detroit telephone number for the device and made and received a number of test calls. The test calls confirmed the following call routing: When an AT&T long distance customer in New Jersey, for example, calls this magicJack[®] device located in New Jersey on its "Detroit" telephone number, the originating LEC in New Jersey first routes the call to AT&T. AT&T then carries the call and hands it off, according to routing instructions YMAX has placed in the LERG, to the Detroit ILEC tandem that serves a YMAX POI in the Detroit area and the ILEC (an AT&T affiliate) then hands the call off to YMAX in Detroit. Although AT&T cannot see beyond the YMAX POI to any further PSTN routing of the call, it can trace part of the Internet routing of the call: the AT&T employee receives the call from his ISP Comcast and the first IP point of contact with YMAX is a proxy server called detroit.talk4free.com – which has a website and Internet addresses that are owned by YMAX, but which appears to be hosted by XO Communications. In other words, it appears that YMAX merely accepts the TDM call in Detroit, performs a protocol conversion from TDM to IP, and then immediately hands the traffic to an Internet connectivity provider.¹⁰ The Internet connectivity provider in this example appears to be XO, which either transports the call directly to Comcast, the magicJack[®] purchaser's ISP (if XO has a direct connectivity arrangement with Comcast), or hands it to other intermediate Internet connectivity providers that eventually deliver the call to Comcast. Comcast delivers the call over its facilities, including its "last-mile" broadband connections to the magicJack[®] purchaser's premises, where it is then transmitted to customer premises equipment: to the magicJack[®] purchaser's computer, the magicJack[®] device and, ultimately, the called party's telephone handset.

YMAX's role, therefore, is minimal at best. Although AT&T has repeatedly asked YMAX for a detailed description of this call flow, YMAX has, to date, declined to provide any detail about how magicJack[®] calls are routed from the YMAX PSTN point of interconnection to the premises of the magicJack[®] purchaser (terminating) or from the premises of the magicJack[®] purchaser to the YMAX POI (originating 8YY). YMAX has never disclosed what equipment, if any, it operates in its "points of interconnection." It has never disclosed exactly what role the

¹⁰ If there is no media gateway located at the Detroit POI, it is possible that YMAX routes the call first to its media gateway for protocol conversion before routing the call through the proxy server and on to XO or another Internet connectivity provider.



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points of interconnection and media gateways it has listed in the LERG play, or which companies might in reality be hosting the proxy servers and Internet websites and addresses YMAX uses. Nor has YMAX ever explained how it could be operating (and charging for) “end office switches,” when it appears that all magicJack[®] calls are routed over local distribution networks owned and operated by unaffiliated broadband ISPs.

YMAX has also billed originating end office switching and other switched access charges on “8YY” toll-free calls that magicJack[®] purchasers have placed to AT&T’s 8YY customers. Again, YMAX does not provide connections to the magicJack[®] purchaser; rather, the magicJack[®] purchaser’s broadband ISP provides that functionality. As with the terminating calls discussed above, the 8YY call may traverse the facilities of multiple Internet connectivity providers before it is delivered to an Internet-connected YMAX “media gateway” that converts the call from IP to TDM format and delivers it into the PSTN for routing to AT&T’s 8YY customer. AT&T has performed test calls that confirm that YMAX’s limited involvement may occur at points that are quite distant both from the point where the call originates and the point where the call terminates. And, again, YMAX does not perform any end office switching function in connection with these calls.

YMAX’s Attempt to Assess End Office Switching Charges Violate the Communications Act, the CLEC Access Charge Rules and Orders, and YMAX’s Federal Tariff. YMAX’s attempt to assess end office switching charges on AT&T – which represent the substantial majority of the charges at issue here – is unlawful. As explained below, the statute and the CLEC access charge rules and orders prohibit a CLEC from charging end office switching if, as here, it does not actually provide end office switching functionality. Moreover, if YMAX’s tariff is construed to permit YMAX to assess end office switching charges in these circumstances, YMAX’s tariff violates Section 201(b); alternatively, if the tariff is given its more natural interpretation, YMAX is blatantly violating its tariff in violation of Sections 201(b) and 203.

YMAX’s End Office Charges Violate Sections 201(b) and 203 and the CLEC Access Charge Rules and Orders. As a putative CLEC, YMAX is subject to the CLEC access charge rules and orders that the Commission has adopted to implement the provisions of Sections 201(b) and Section 203 of the Act. These rules permit CLECs to collect access rate elements only to the extent they are actually providing the underlying access services that are functionally equivalent to the access services provided by the competing ILEC.¹¹ As detailed below, YMAX’s services

¹¹ See 47 C.F.R. § 61.26; *CLEC Access Charge Recon Order* ¶ 15.



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are not functionally equivalent to ILEC end office switching services. Thus, YMAX is violating the Commission's rules and orders and Section 201(b) and 203 of the Communications Act.¹²

YMAX has attempted to take advantage of the rules that allow CLECs to file interstate exchange access rates that mirror those of the "competing" ILEC in each area where the CLEC provides service. *See* 47 C.F.R. § 61.26. Under these rules, CLECs are entitled to tariff and charge the competing ILEC's exchange access rates *only if* the CLECs' services are "the functional equivalent of the ILEC interstate exchange access services."¹³ In addition, under the Commission's rules, CLEC charges that exceed the corresponding ILEC benchmark rates are "mandatorily detariffed and may be imposed only pursuant to a negotiated agreement," and tariffs that impose rates that exceed the benchmark are unlawful.¹⁴ Accordingly, the Commission's rules prohibit a CLEC from applying the ILEC's rate for end office switching to services that are, in reality, equivalent to the ILEC's (typically lower-priced) tandem switching, transport, or transiting services. In the event the CLEC applies the end office switching rate to these other services the CLEC is (or may be) performing, the CLEC's charges exceed the benchmark rate and violate Sections 201(b) and 203.

The largest component of YMAX's interstate access bills to AT&T consists of charges for the "end office switching" rate element, but YMAX does not provide any services that are "functionally equivalent" to ILEC local end office switching services. In ILEC networks, end office switches are the local switches that, on the "line side," are connected to individual end users via "local loops" and that, on the "trunk side," are connected to other (tandem or

¹² Further, as explained below, to the extent YMAX's access tariff could be interpreted to permit the charges, then the offending terms in YMAX's tariff are unlawful, and constitute an unreasonable "practice," "classification," or "regulation" in violation of Section 201(b).

¹³ 47 C.F.R. § 61.26; Seventh Report and Order and Further Notice of Proposed Rulemaking, *In re Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, 16 FCC Rcd. 9923 (2001) ("CLEC Access Charge Order").

¹⁴ *CLEC Access Charge Recon Order* ¶ 4.



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interexchange) switches via higher-capacity transport links.¹⁵ End office switches route calls directly on to or off of the loop facilities that connect directly to end users' premises.

YMAX does not own or operate the functional equivalent of end offices (or local loops) and thus does not provide the functional equivalent of end office switching. YMAX does not own or operate any local exchange switching equipment that connects directly to local loops and that route calls on to or off of local loops. Rather, as discussed above, magicJack[®] purchasers are required to obtain analogous functions separately from ISPs in order to use the magicJack[®] service, and it is the magicJack[®] purchasers' ISPs (such as Comcast, Verizon, or in some cases AT&T itself) that route the calls over broadband connections to and from the premises of magicJack[®] purchasers. As explained above, YMAX is a limited-purpose entity that provides only protocol conversions and links to other intermediate transport providers, often hundreds if not thousands of miles away from the "local exchange" serving the end user. YMAX's only role is to provide a bare connection and protocol conversion between the PSTN and the Internet, before handing the call off to intermediate long-distance Internet transport providers like XO.

The Commission has expressly held that entities like YMAX cannot assess end office switching charges. Prior to the Commission's *CLEC Access Charge Recon Order*, it was commonplace for CLECs to attempt to recover end office switching charges when they had not provided end office switching or direct connections to the end user, but instead had provided only the equivalent of tandem switching, transport, or transiting services. The Commission prohibited this practice in its *CLEC Access Charge Recon Order*. It ruled that CLECs may charge end office switching "only when a competitive LEC provides an IXC with access to the competitive LEC's *own end-users*"¹⁶ and only "when a competitive LEC originates or terminates

¹⁵ This universal understanding of the nature of an "end office" switch is also reflected in the Commission's treatment of end office switching in other contexts. *See, e.g.*, 47 C.F.R. § 69.2(pp) ("End Office means the telephone company office from which the end user receives exchange service"); First Report and Order, *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd. 15499, ¶¶ 412, 425 & App. B (1996) (Rule 51.319(c)) (defining "local switching" as encompassing both "line-side facilities" and "trunk-side facilities," in contrast to "tandem switching," which is defined as "trunk-connect facilities" and "the basic switching function of connecting trunks to trunks"); *see also* Memorandum Opinion and Order, *TSR Wireless, LLC v. U S WEST Communications, Inc.*, 15 FCC Rcd. 11166, ¶ 22 (2000) (receiving calls in terminal equipment and delivering the call directly to the called party are the functions "equivalent" to an end office).

¹⁶ *CLEC Access Charge Recon Order* ¶ 15 (emphasis added); *see also id.* ¶¶ 9, 14-21; 47 C.F.R. § 61.26(f).



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calls to end-users.”¹⁷ The Commission emphasized that this rule is an application of the Commission’s “longstanding policy” that LECs “should charge only for those services that they provide.”¹⁸ It noted that even “if an incumbent LEC switch is capable of providing both tandem and end office functions, the applicable switching rate should reflect only the function(s) actually provided to the IXC.”¹⁹ Accordingly, the benchmark rate for CLECs “is the end office rate when a competitive LEC originates and terminates calls to end-users and the tandem switching rate when a competitive LEC passes calls between two other carriers.”²⁰ Because YMAX does not originate or terminate calls to end users and serves only as an intermediary passing calls between other networks, its end office switching charges are unlawful.

YMAX may attempt to defend its end office switching charges on the theory that it can assess access charges on *behalf* of the ISPs that serve the magicJack[®] purchasers, because those ISPs themselves do not assess per minute access charges on IXCs. The Commission’s *CLEC Access Charge Recon Order* expressly prohibits any such practice. In that *Order*, the Commission held that a CLEC is not permitted to collect access charges on behalf of CMRS providers or any other entity that does not have a tariff, a contract, or some other “independent right to collect from the IXC.”²¹ In particular, the Commission addressed the question whether a CLEC that does not serve end users should be entitled to collect the full switched access benchmark rate on the theory that it was acting on behalf of a carrier that did serve the end user. Although the Commission concluded that “there are situations where a [CLEC] may bill an IXC on behalf of itself and another carrier for jointly provided access services pursuant to meet point billing methods,” the Commission emphasized that an intermediate LEC may do so *only if* the

¹⁷ *CLEC Access Charge Recon Order* ¶ 21 (“the competing incumbent LEC switching rate is the end office switching rate *when a competitive LEC originates or terminates calls to end-users*”) (emphasis added).

¹⁸ *Id.* ¶ 21 & nn.70-71 (citing orders and tariffs).

¹⁹ *CLEC Access Charge Recon Order* ¶ 21.

²⁰ *Id.* ¶ 21. *See also id.* ¶ 14 (“we also reject the argument made by some competitive LECs that they should be permitted to charge the full benchmark rate when they provide any component of the interstate switched access services used in connecting an end-user to an IXC”; rates must be “tethered to the provision of particular services”).

²¹ *CLEC Access Charge Recon Order* ¶ 16 (“In cases where the carrier serving the end-user ha[s] no independent right to the collect from the IXC, industry billing guidelines do not, and cannot, bestow on a LEC the right to collect access charges on behalf of that carrier”). *Accord, Hypercube Telecom, LLC v. Level 3 Commc’ns, LLC*, No. 09-05-009, 2010 WL 2141858 (Cal. PUC May 20, 2010) (originating end office switching charges cannot be imposed by an entity that delivers 8YY calls from a CMRS provider to an IXC).



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entity that is actually serving the end-user customer has an independent right to collect access charges from the IXC.²²

That is not the case here because neither MagicJack LP nor the magicJack[®] purchasers' ISPs are local exchange carriers and, therefore, they have no legal right to collect access charges under the Commission's rules (and they instead recover their costs through end user fees). In this regard, there are no tariffs, contracts, or other legal authorizations that entitle MagicJack LP or the unaffiliated ISPs that actually connect to the magicJack[®] purchasers to impose access charges on IXCs for origination or termination of the calls at issue.²³

In sum, YMAX's attempts to collect end office local switching charges and gain a pure windfall for services it does not perform is a patently unreasonable practice: it is the MagicJack purchaser, not YMAX, that arranges and pays for the local facilities that route the call to his or her premises. Indeed, these are precisely the types of unreasonable practices that the CLEC access charge rules and orders were designed to curb in the face of terminating access monopolies (and in the case of called-party-pays 8YY traffic, originating access monopolies).

YMAX's Tariff Is Either Unlawful Or It Is Being Violated. YMAX contends that its FCC tariff authorizes it to bill for these end office switching and other functionalities that it does not provide. If YMAX's tariff is construed to permit billing in violation of the CLEC access charge rules and governing precedent, the definitional and billing provisions of YMAX's tariff that govern billing for end office switching and other switched access services are themselves unjust and unreasonable and constitute an unjust and unreasonable "practice" in violation of Section 201(b).

If YMAX's tariff terms are applied as written, however, YMAX's end office switching charges blatantly violate the tariff.²⁴ Under Section 203(c) of the Act, a CLEC may only impose switched access charges "as specified" in its tariff. 47 U.S.C. § 203(c). In drafting its switched access tariff, YMAX has borrowed tariff provisions from the access tariffs of traditional ILECs. Traditional ILECs, however, employ traditional wireline architectures, in which there are neighborhood "end office" switches that connect directly to line-side local loops that deliver traffic to the end user's premises. The language of these traditional ILEC tariffs reflect these architectures, and describe end office switching charges (and most other charges) by reference to

²² *CLEC Access Charge Recon Order* ¶ 16.

²³ In addition, because YMAX has no meet-point billing contractual relationship with any of the local broadband ISPs that serve magicJack[®] purchasers, YMAX could not assess access charges on this theory for this separate and independent reason as well.

²⁴ YMAX filed its initial tariff on one day's notice (issued April 25, 2007 and effective April 26, 2007). Consequently, the tariff is not "deemed lawful." *See* 47 U.S.C. § 204.



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these architectures. For this reason, there is an enormous disconnect between YMAX's tariff definitions and descriptions of an "end office switching" service, and the radically different and far more limited architecture that YMAX actually employs, which does not even remotely resemble or provide the functionality of such a service. And even if the Commission were to conclude that YMAX's tariff is ambiguous in any of these respects, settled law would require that the ambiguity be construed against the carrier that filed the tariff (YMAX) and in favor of the customer (AT&T).²⁵

YMAX does not provide "end office switching" as defined in its tariff. Under YMAX's tariff, the "End Office Switching rate category" authorizes charges for "the use of end office switching equipment" and for "the terminations in the end office of end user lines." YMAX FCC Tariff, § 3.3.2. YMAX has not provided "end office switching" because YMAX does not own or lease any end office switching equipment that directly connects to and terminates any end user lines (*i.e.*, loops). Likewise, YMAX plainly does not operate an "End Office Switch" within the meaning of its tariff, which defines that term as a "Company switching system where [IXC] or End User station loops are terminated for purposes of interconnection to other station loops, trunks, or access facilities." *Id.* As explained above, the YMAX facilities do not terminate any "station loops." Instead, if there are analogues to these end office switching facilities in the calls at issue, they are provided by the magicJack[®] purchasers' ISPs and not YMAX.

Moreover, YMAX and MagicJack promote the fact that a magicJack[®] purchaser can select any telephone number obtained by YMAX, even if the purchaser is located hundreds or even thousands of miles away from the area associated with the "NPA-NXX" of the selected telephone number. And even where the magicJack[®] purchaser selects a telephone number associated with the same geographic area as her physical location, YMAX's limited transiting and protocol conversion role will occur far upstream of the networks and facilities that actually route the calls on to and off of the lines that serve that magicJack[®] purchaser's premises. The notion that YMAX could be providing a local "end office" switching function, when in fact it is providing an extremely limited transiting function far removed from the local loops that serve the

²⁵ See *American Satellite Corp. v. MCI Telecommunications Corp.*, 57 F.C.C.2d 1165, ¶ 6 (1976) ("It is well settled that where there is an ambiguity, uncertainty, or reasonable doubt as to which of two constructions should prevail in a tariff schedule, the ambiguity should be resolved against the maker of the tariff and in favor of the customer").



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end users, stretches the concept of an “end office” and a “local exchange” beyond any reasonable construction of those terms.²⁶

For all of these reasons, YMAX’s conduct constitutes a plain violation of the Commission’s CLEC access charge rules and orders and Sections 201(b) and 203.

YMAX’s Attempts to Assess Any Switched Access Charges on AT&T Violate Its Tariff and Sections 201(b) and 203. More fundamentally, YMAX’s attempts to assess *any* charges for tariffed switched access services appear to be unlawful. This is so for three reasons: (1) The functionality that YMAX provides in the middle of the calls at issue involves a net protocol conversion, and the “service” that YMAX provides to IXC’s is therefore an information service, not the common carrier telecommunications service it has tariffed; (2) YMAX’s tariff defines “switched access” in all material respects like the tariff at issue in *Farmers III*,²⁷ in which the Commission held that the LEC was not providing switched access service at all because, as here, the putative “end user” was not billed by and did not pay the putative LEC in accordance with the terms and conditions of the LEC’s tariffs; and (3) although, as explained above, any switching services that YMAX performs on the calls at issue are, at most, tandem switching services, it does not appear that YMAX performs any switching functions at all.

Any Service YMAX Provides to AT&T Is An Information Service. YMAX’s putative “access” service is not a common carrier telecommunications service at all. Based on the arrangements described above, the real service that YMAX provides is to perform a net protocol conversion between TDM and IP format for incoming and outgoing calls. It acts essentially as a bridge between the PSTN and the Internet – in the case of a call from an AT&T customer to a magicJack® purchaser, for example, the call enters YMAX’s facilities in TDM protocol and exits YMAX’s facilities en route to other networks (and, eventually, the called magicJack® party) in

²⁶ The entries that YMAX has made to the LERG further confirm that YMAX’s services do not properly meet the definition of the End Office Switching rate category. The LERG lists 118 Points of Interconnection (in 46 states), 33 integrated media gateways (in 22 States), and a Digital Packet Device, a Call Agent, and a Trunk Gateway in Florida. Although YMAX appears to believe that these “points of interconnection” are the end offices for purposes of its end office switching bills, YMAX has never explained what switching equipment, if any, exists in these locations. Moreover, it seems clear that these points of interconnection have *no* switches: despite the fact that YMAX has over 100 points of interconnection in 46 states, in a recent filing with the Securities and Exchange Commission YMAX stated that it operated switches in only 32 cities across the nation. VocalTec 6-K, at 8. In short, YMAX has yet to explain what equipment may be in any of these YMAX locations and how whatever equipment it may have there could constitute an end office switching function within the meaning of its tariff.

²⁷ 24 FCC Rcd. 14801.



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IP protocol. The Commission has repeatedly held that that the provision of a service characterized by a *net* protocol conversion is an “information service,” not a “telecommunication service.”²⁸

Moreover, the unique nature of YMAX’s arrangements means that the Commission can easily find these services to be information services in a narrow ruling, applying well established precedents, while leaving for another day the broader issue of how to classify VoIP services more generally.²⁹ YMAX does not appear to own or operate any significant facilities beyond its protocol conversion equipment; whatever “transport” functionality it provides is extremely minimal. Moreover, YMAX does not separately bill for its protocol conversion functions. Accordingly, from the customer’s perspective, the protocol conversions are provided “always in connection with” the minimal transport functionality in YMAX’s limited architecture – which means, under well-established precedent, that the entire service is an information service.³⁰

The Commission has never held that information service providers may tariff their services, and obtain the benefits of the filed tariff doctrine.³¹ But even if YMAX could tariff the information service it provides, it has not done so; it has tarified only common carrier switched

²⁸ See, e.g., Report and Order, *In re Amendment to Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)*, 2 FCC Rcd. 3072, ¶¶ 64, 68-69 (1987); Memorandum Opinion and Order and Statement of Principles, *In re Communications Protocols under Section 64.702 of the Commission's Rules and Regulations*, 95 F.C.C.2d 584, ¶ 14 (1983); First Report and Order and Further Notice of Proposed Rulemaking, *In re Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended*, 11 FCC Rcd. 21905, ¶¶ 102-03 (1996); Order, *In re Petition for Declaratory Ruling That AT&T's Phone-to-Phone IP Telephony Services Are Exempt From Access Charges*, 19 FCC Rcd. 7457, ¶ 4 (2004).

²⁹ In all events, the Commission may not decline to decide an issue that is squarely presented in a complaint merely because the issue has not yet been resolved in a pending rulemaking or other proceeding. E.g., *AT&T Co. v. FCC*, 978 F.2d 727, 731-33 (D.C. Cir. 1992) (“when presented with AT&T’s complaint, the Commission had an obligation to answer the questions it raised and to decide whether MCI had violated the statute,” and avoiding the issue presented is “a sort of administrative law shell game”).

³⁰ See, e.g., *NCTA v. Brand X Internet Servs.*, 545 U.S. 967, 988, 990 (2005) (cable modem service is an information service because, “seen from the [customer]’s point of view,” which here is AT&T, the telecommunications is provided “always in connection with information-processing capabilities”).

³¹ 47 U.S.C. § 203 (“Every *common carrier* . . . shall . . . file with the Commission and keep open for public inspection schedules showing all charges . . .”).



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access transmission services that it is *not* actually providing. Nor has YMAX attempted to enter into any contractual arrangement to govern its information service.

YMAX's Services Are Not Switched Access Services Within the Meaning of Its Tariff. Given the terms of its tariff, YMAX is also prohibited from assessing any switched access charges on AT&T under the Commission's recent *Farmers III* decision.³² In *Farmers III*, the Commission focused on a tariff's definition of switched access service as a service provided to an end user, which was, in turn, defined as a non-carrier "customer" that purchased the End User access service offered in the LEC's tariff. The Commission held that the LEC was not providing a switched access service for the calls at issue, because the putative end users in that case were not billed by the LEC and did not pay for tariffed End User Common Line ("EUCL") services (or any other tariffed services) on a monthly basis as required by the tariff. The Commission held it is an unjust and unreasonable practice in violation of Section 201(b) of the Act when a carrier bills switched access charges, but when the functions that it provides are not "switched access" within the meaning of the carrier's tariff.³³

YMAX is likewise not providing any "Switched Access Service" within the meaning of its tariffs – which means that *none* of its billed charges are appropriate. Under YMAX's tariff, "Switched Access is furnished for originating and terminating calls by the Customer [an IXC] to its end user [that is, the IXC's customer]." YMAX FCC Tariff, § 3.2.1. "Switched Access Service" is defined by the tariff as the provision of "a two-point communications path between a Customer's [*i.e.*, IXC's] premises and an End User's Premises" that uses "common subscriber plant" and "common terminating, switching, and trunking facilities."³⁴ Under the YMAX tariff, an "End User Premises" is the "premises specified by the Customer or End User for the termination of access services at the End User's physical location," *id.* § 1, Page 10, and an "End User" is an entity "that uses the service of the Company under the terms and conditions of this tariff."³⁵

³² 24 FCC Rcd. 14801.

³³ *Farmers III* ¶ 26.

³⁴ YMAX FCC Tariff, § 3.1. Thus, YMAX's tariff is like the tariff at issue in *Farmers III*, which defined switched access service as providing a communications path to and from an "End User's Premises." *Id.*; see *Farmers III* ¶ 23 (defining Switched Access Service as "a two-point communications path between a customer-designated premises and an end user's premises").

³⁵ *Id.* § 1, Page 10. The tariff goes on to state that "[i]n most contexts, the End User is the customer of an interexchange carrier who in turn utilizes the Company's Switched or Dedicated Access services described in this tariff to provide the End User with access to the IXC's communication and switching systems."



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Thus, YMAX's tariff is in all material respects just like the tariff in *Farmers III*. Under YMAX's tariff, "switched access service" is provided only when YMAX (among other things) terminates calls to the premises of an end user that uses YMAX's services pursuant to the terms in YMAX's access tariff. MagicJack purchasers, however, do not use YMAX's tariffed access services. Under the YMAX tariff, end users must obtain an "End User Access" service, which "provides for the use of an End User Common Line ('local loop') to originate or terminate interstate long distance calls. A monthly recurring charge applies to each local access line for this service." YMAX FCC Tariff, § 5.1.1.; *id.* § 5.1.3 (providing for a monthly rate per line of \$7). YMAX does not assess or collect a \$7 monthly recurring charge for End User Access service from the magicJack® purchasers. Rather, magicJack® purchasers are not billed by YMAX and do not pay YMAX anything.³⁶ Accordingly, as the Commission held in *Farmers III*, because the evidence "demonstrates that the [magicJack® purchasers] did not subscribe, nor did they seek to subscribe, to the services offered under the [YMAX] tariff," YMAX "was not entitled to charge [AT&T] switched access charges under the terms of [YMAX's] tariff."³⁷

Nor could YMAX escape this conclusion by claiming that MagicJack LP or the ISPs with whom YMAX interconnects are "end users." Under the tariff, "Switched Access" is a service that "is furnished for originating and terminating calls by the Customer [an IXC] to *its* end user [that is, the IXC's customer]." YMAX FCC Tariff, § 3.2.1 (emphasis added). AT&T's end user is clearly the individual person who placed or who received the call. Neither MagicJack LP or the ISP from whom YMAX receives Internet connectivity is AT&T's "end user." Such entities are not "end users" for an additional, independent reason: to be an end user within the meaning of the tariff, an entity must also be a customer of YMAX who pays the End User Common Line charge (EUCL) and obtains local service from YMAX. YMAX Tariff FCC No. 1, § 5.1.1.; *id.* § 5.1.3 (providing for a monthly rate per line of \$7). Neither MagicJack LP nor any of the

³⁶ Indeed, magicJack® purchasers are hardly even aware of YMAX's existence; the only mention of YMAX comes in the "click through" terms of service presented to the purchaser upon initial setup, and the terms of service nowhere suggest that magicJack® purchasers must subscribe to any tariffed YMAX service; rather, they note only that telephone numbers "may" be supplied by YMAX.

³⁷ *Farmers III* ¶ 10; *see also id.* ¶ 22 (since the called parties "did not subscribe to the services offered under Farmers' filed tariff, they were not 'customers' or 'end users,'" and "in turn, the service Farmers provided to Qwest for calls of the conference calling companies was not 'switched access service' as defined in the tariff"). In addition, Section 5.1.2 of YMAX's tariff provides that "End Users" have the option to presubscribe to a particular IXC – but the terms of service of the magicJack® device do not give purchasers the option of "select[ing] and designat[ing] to the Company [*i.e.*, YMAX]" a presubscribed IXC, which further confirms that magicJack® purchasers are not "End Users" under the tariff.



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Internet connectivity providers involved in transporting calls to magicJack[®] purchasers pays the EUCL or obtains local service from YMAX.

YMAX's services are not "switched access" for yet another reason. YMAX's tariff requires that access services provide "capacity *within a LATA*" that creates a communications path between the IXC and the IXC's end user. *Id.* § 3.3.3 (emphasis added).³⁸ As the LERG entries demonstrate, however, YMAX's media gateways are often located in different states or LATAs than the points of interconnection where YMAX receives traffic from the PSTN or delivers traffic to the PSTN. In addition, as AT&T's test calls confirm, the points of interconnection where YMAX connects with the PSTN on a call often are not located in the LATA where the call originated (on 8YY calls) or in the LATA where the call terminated (on calls from the PSTN to magicJack[®] purchasers). Thus, contrary to its tariff, YMAX has not created a communications path between AT&T and the party who has placed or received the call (*i.e.*, the end user) *within* the LATA where that party is located. This is also further confirmation that any service that YMAX provides is an interexchange transiting service, not exchange access.

Even if YMAX Were Providing the Functional Equivalent of Tandem Switching, It Is Not Providing Tandem Switching as Defined in Its Tariff. As detailed above, the functionality that YMAX provides is more akin to tandem switching than end office switching. But YMAX is not providing tandem switching as it has defined that term in its tariff. YMAX's tariff defines "Access Tandem" and "Tandem Switch" as a "switching system that provides a traffic concentration and distribution function for originating or terminating traffic between an End User's Premises and the [IXC's] Point of Presence." YMAX FCC Tariff, § 1. Under the tariff, tandem switching is a service in which YMAX would switch calls between End Offices and the POPs of those IXCs who choose not to establish direct connections to End Offices. *Id.*, § 3.2.5. The tariff further provides that "Switched Transport" charges apply to traffic that was "tandem switched," so transport charges cannot be assessed unless tandem switching is provided. *Id.* § 3.3.1.

But YMAX does not appear to perform any true switching functions. Rather, YMAX appears to deliver all of the PSTN traffic it receives at a given location to the Internet connectivity provider with whom it deals at that location and to deliver all of the IP traffic it receives at a given location to the ILEC tandem provider with whom it interconnects at that location. In other words, YMAX functions as a mere conduit and protocol converter that does not switch any traffic. YMAX's service is thus not the "functional equivalent" of a tandem switching service, but at most the functional equivalent of a transiting service. Transiting

³⁸ "Originating" switched access "represents access capacity within a LATA for carrying traffic from the End User to the [IXC]" and "terminating" switched access is "capacity within a LATA for carrying traffic from the [IXC] to the End User." YMAX FCC Tariff, § 3.2.3.



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services are typically not tariffed exchange access services at all, but rather the type of non-access service in which the terms of compensation are typically established by carrier-to-carrier contracts or other agreements.³⁹

YMAX Has Violated the Terms of Its Interstate Tariff by Billing AT&T Intrastate Charges on Many Calls That Its Tariff Defines as Interstate. In direct violation of its interstate access tariff, YMAX has billed AT&T far fewer interstate access minutes, and thus many more intrastate access minutes, than is appropriate. Because YMAX's intrastate access rates are higher than its interstate access rates, YMAX's billing practices therefore result in AT&T being overcharged.

YMAX's interstate access tariff provides that a "call is an interstate communication" if the "NPA-NXX" of the telephone number assigned to the magicJack[®] purchaser "placing or receiving the call is not within the same state as the called or calling party."⁴⁰ Accordingly, under the plain terms of the YMAX tariff, YMAX is required to treat a call as interstate when, based upon "NPA-NXX," the called and calling parties' numbers are associated with different states.⁴¹ In addition, the tariff provides that, for traffic (such as originating 8YY traffic) where YMAX "does not possess the capability to adequately determine the jurisdiction of a switched access services," YMAX will either use a customer-supplied "PIU factor," which is an estimate of the percentage of interstate use for that traffic, or, in the absence of a customer-supplied PIU, will utilize a default 50 percent PIU factor.⁴² In fact, however, YMAX has failed to follow its own interstate tariff, and, as a result, has substantially inflated its access bills to AT&T.⁴³

For calls terminating to the magicJack[®] purchasers, YMAX has billed AT&T as if approximately 65 percent of the calls are interstate and about 35 percent of the calls are intrastate. Based on its experience with other carriers, AT&T believed that interstate percentage to understate substantially the number of terminating interstate calls, and AT&T repeatedly

³⁹ See, e.g., *Universal Service Support*, 24 FCC Rcd 6475, ¶ 347 & n.888; *Developing a Unified Inter-carrier Compensation Regime*, 20 FCC Rcd. 4685, ¶ 120 (2005).

⁴⁰ YMAX, F.C.C. Tariff No. 1., § 2.9.2.D., Original Page 25 (eff. Apr. 26, 2007). An intrastate call occurs when the "NPA-NXX" of the magicJack[®] purchaser "placing or receiving the call is within the same state as the called or calling party." *Id.*

⁴¹ *Id.* § 2.9.2.C., Original Page 26 (eff. Apr. 26, 2007).

⁴² See YMAX FCC Tariff, §§ 2.9.2.F., 2.9.2.H.

⁴³ The Commission plainly has jurisdiction to address YMAX's violation of its interstate access tariff, where the overbilling by YMAX relates to intrastate charges that should have been billed as interstate. See Declaratory Ruling, *In re Thrifty Call, Inc. Petition for Declaratory Ruling Concerning BellSouth Telecommunications, Inc.*, 19 FCC Rcd. 22240, ¶ 11 (2004).



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asked YMAX to disclose in detail how YMAX determines whether to bill its services as interstate or intrastate. For months, YMAX refused to provide any detailed explanation of its billing methods, but ultimately it provided AT&T a sample of call records. When AT&T reviewed the data, it revealed that more than 80 percent of the terminating traffic was interstate, as the tariff defines an interstate call.

YMAX alone possesses the data needed to determine which calls terminating to magicJack[®] purchasers should be classified as interstate pursuant to the terms of its tariff (*i.e.*, the relevant call detail records), and thus, a precise calculation of YMAX's overcharges to AT&T would have to await discovery of data from YMAX. However, based on the sample of data reviewed by AT&T, it is clear that YMAX's charges are substantially inflated.

YMAX's access charges relating to originating 8YY calls have also been inconsistent with the terms of its interstate tariff. On originating 8YY calls, it is generally not possible for YMAX to determine the jurisdiction of the calls, because the "8YY" number does not provide any indication of the geographic location where the call was terminated. Accordingly, under YMAX's tariff, YMAX must either use a "PIU factor" supplied by AT&T or, if none is provided, assume that 50 percent of the calls are interstate.⁴⁴ While YMAX initially billed AT&T using a 50 percent PIU, between January and October 2009, YMAX inexplicably began billing AT&T using a much lower PIU factor – in some cases as low as 20 percent. These charges clearly violate the terms of YMAX's interstate tariff by understating the number of interstate access minutes and overstating the number of intrastate access minutes, and thus result in substantial overcharges in violation of Sections 203 and 201(b) of the Communications Act.⁴⁵

YMAX's Billed Charges in Some Cases Improperly Exceed the Rates in YMAX's Tariff. YMAX's billed charges to AT&T are also improper based on the independent grounds that some charges exceed the rates in YMAX's interstate tariff. In at least seventeen states, YMAX has billed AT&T at rates that exceed the rates for access services specified in YMAX's interstate tariff. For example, for the states of Alabama, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina and Tennessee, YMAX's bills to AT&T for the local switching rate element have been \$0.002440 per access minute, when YMAX's interstate tariff provided for a rate of \$0.002158. Likewise, in 2009 and 2010, YMAX's bills to AT&T began to include interstate charges for services allegedly provided in the District of Columbia, Illinois, Indiana, Massachusetts, Maryland, Michigan, New Jersey, New York, Ohio, Rhode Island, Virginia, Wisconsin and West Virginia, and the billed rates for the local switching rate

⁴⁴ YMAX FCC Tariff, §§ 2.9.2.F., 2.9.2.H.

⁴⁵ More recently, YMAX has been billing originating 8YY charges at the much higher PIU requested by AT&T.



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element for services purportedly provided in these states likewise exceeded YMAX's tariffed rates.⁴⁶

It is axiomatic that when a carrier provides a tariffed service, the carrier's billed charges cannot exceed the rates specified in the carrier's tariffs.⁴⁷ Accordingly, YMAX has violated Section 203 of the Act and the filed rate doctrine and also committed an unreasonable practice in violation of Section 201(b).

YMAX in Some Cases Has Billed AT&T at Tariffed Rates that Exceed the Maximum Competing ILEC "Benchmark" Rates. Under the Commission's rules, a CLEC is prohibited from assessing tariffed switched access rates that exceed the specified benchmarks.⁴⁸ As the Commission has explained, "[r]equiring CLECs to negotiate with their IXC customers in order to obtain access rates above the benchmark" is necessary to "limit the CLECs' ability to exercise [its] market power and unilaterally impose rates above the level that we have found to be presumptively reasonable."⁴⁹

YMAX's practices violate these rules (and therefore the Act). As noted, a magicJack[®] purchaser may obtain a telephone number with any NPA-NXX prefix in the YMAX/MagicJack inventory without regard to that purchaser's geographic location. This non-geographic number assignment, combined with YMAX's improper billing practices, enables YMAX to subvert the Commission's rules and the Act. For example, if a magicJack[®] purchaser lives in Los Angeles but has an NPA-NXX number from Seattle, YMAX, upon information and belief, bills access charges based on the ILEC benchmark rate in Seattle (the location of the NPA-NXX number), not the ILEC rate in Los Angeles (the location of the magicJack[®] purchaser). The CLEC access charge rules are clear, however: the "[c]ompeting [benchmark] ILEC shall mean the incumbent local exchange carrier, as defined in 47 U.S.C. § 251(h), that would provide interstate exchange access services, in whole or in part, to the extent those services were not provided by the

⁴⁶ As explained above, AT&T believes that these end office local switching charges are entirely unlawful, regardless of the tariffed or billed rate, for the independent reason that YMAX did not provide the end office switching function.

⁴⁷ *MCI Telecomms. Corp. v. AT&T*, 512 U.S. 218, 230 (1994) (quoting *Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 126 (1990) (other citations omitted)).

⁴⁸ 47 C.F.R. § 61.26.

⁴⁹ *CLEC Access Charge Order* ¶ 84.



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CLEC.”⁵⁰ Indeed, the Commission has made clear that the “competing ILEC” for any particular end user is the ILEC in whose service area that end user is located.⁵¹ In the above example, that would obviously be the Los Angeles ILEC, not the Seattle ILEC, and therefore YMAX’s access bills constitute an unreasonable practice under Section 201(b) for this reason as well.

* * * *

For the reasons stated herein, the Commission should find that: (1) YMAX has violated Sections 201(b) and 203 of the Communications Act and the Commission’s implementing rules and orders by billing AT&T for switched access services that it has not provided; (2) YMAX has violated its own tariff (and thus Sections 201(b) and 203) by billing AT&T tariffed switched access charges that are not authorized by its tariff; (3) that, to the extent YMAX’s tariff purports to authorize the disputed charges, the tariff itself violates Section 201(b) and the Commission’s implementing rules and orders; (4) YMAX has violated its interstate access tariff and Sections 201(b) and 203 by improperly treating as intrastate services calls that its tariff defines as interstate; (5) YMAX has violated Sections 201(b) and 203 by charging rates that exceed the rates set forth in YMAX’s tariffs; and (6) YMAX has violated Sections 201(b) and 203 by charging rates that exceed the competing ILEC benchmark rates.

Very truly yours,

A handwritten signature in black ink, appearing to read "David L. Lawson".

David L. Lawson

⁵⁰ 47 C.F.R. § 61.22(a)(2); *see also* CLEC Access Charge Order, 16 FCC Rcd. 9923, ¶ 51 (2001) (CLEC may benchmark to “the rate of the corresponding incumbent carrier in the study area of the relevant end-user customer”); *id.* ¶ 52 (benchmark is “the rate of the ILEC with which the CLEC competes” for the customer); *id.* ¶ 45 (“benchmark is the “switched access rate of the incumbent provider operating in the CLEC’s service area”).

⁵¹ CLEC Access Reform Recon. Order ¶ 47 (“as AT&T correctly observes, there is one ‘competing ILEC’ and one ‘competing ILEC rate’ for each particular end user,” and thus “competitive LECs serving an area with multiple incumbent LECs can qualify for the safe harbor by charging different rates for access to particular end-users based on the access rate *that would have been charged by the incumbent LEC in whose service area that particular end user resides*”).